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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 506

COMTEL CORPORATION, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 16, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

COMTEL CORPORATION, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comtel Corporation (Comtel) and the thirty other petitioners named in the printed Appendix for the Petitioners (1a)* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding.

Opinions Below

The opinion of the Tax Court (5a-29a) is reported at 45 T. C. 294. The opinion of the Court of Appeals (pp. 5b-17b, Appendix to this petition) affirming the decision of the Tax Court is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on May 4, 1967 (162a) and rehearing was denied by orders dated and entered on June 2, 1967 (185a, 188a).

*Record references, unless otherwise indicated, are to the printed Appendix for the Petitioners.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1) and Section 7482(a) of the Internal Revenue Code of 1954,* 26 U. S. C., Section 7482(a). The jurisdiction of the Tax Court was based upon Sections 6213 and 6214, 26 U. S. C. Sections 6213 and 6214.

Questions Presented

1. As a matter of law, can a debt exist for Federal income tax purposes if the alleged debtor does not have an unconditional legal obligation to pay money to the alleged creditor?

2. May a Court of Appeals properly refuse to consider an additional legal argument made by the appellant for the first time in that Court with respect to the interpretation of a statutory provision the meaning of which was at issue in the trial court, where that legal argument is based upon the record already made and does not require the taking of additional evidence or the making of additional findings of fact?

Statutes Involved

The statutes involved are Section 337(a) and Section 1232(a) and (b), 26 U. S. C. Section 337(a) and Section 1232(a) and (b). Such statutes are set forth in the Appendix to this petition at pages 1b-4b.

Statement of the Case

This petition seeks review of a judgment determining a deficiency in the Federal income tax of Comtel for its taxable year 1958 in the amount of $215,621.33. The thirty

*All section references, unless otherwise indicated, are to the Internal Revenue Code of 1954.

other petitioners are former stockholders of Comtel (which has been dissolved) who are liable as transferees for any deficiency in its income tax. Petitioners started this proceeding on January 11, 1963, in the Tax Court of the United States (2a). The basic facts in the case are not disputed, being almost entirely stipulated by the parties (30a-140a) and in part established by the uncontradicted testimony of one witness (141a-147a). The facts may be summarized as follows:

In February, 1958, Comtel purchased from Zeckendorf Hotels Corporation (Zeckendorf) for Zeckendorf's acquisition price ($8,264,000) over 90% of the shares of Commodore Hotel, Inc. (the Commodore shares). Zeckendorf had simultaneously acquired the Commodore shares from the public pursuant to a tender offer under which Zeckendorf had previously become obligated to purchase them.* Zeckendorf for some months prior to February, 1958, had attempted without success to borrow the money from various sources to finance its obligation under the tender offer. Both Comtel and its shareholders** had refused to loan money to Zeckendorf for that purpose (32a, 33a, 142a).

At the time of the purchase, Comtel granted Zeckendorf an option exercisable after six months to purchase the Commodore shares from Comtel for $9,136,000 (35a). Zeckendorf was not obligated to Comtel to exercise the option (144a). There was considerable doubt in February, 1958, whether Zeckendorf would be able to secure the financing

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*In substance, this was a purchase by Comtel directly from the public shareholders since Zeckendorf was merely a conduit obligated to transfer the Commodore shares to Comtel the instant they were received from the public shareholders. *Commissioner* v. *Moore*, 48 F. 2d 526 (10th Cir. 1931), *cert. denied*, 284 U. S. 620; *Roebling Securities Corp.* v. U. S., 176 F. Supp. 844 (D. N. J. 1959).

**Comtel's shareholders were Tri-Continental Financial Corporation, Eastman Dillon, Union Securities & Co., a partnership, and Zeckendorf. Each shareholder owned one-third of Comtel's stock.

which would permit it to exercise the option (145a). The agreements between the parties contained numerous provisions as to procedure if Zeckendorf did not exercise the option (37a, 53a, 54a, 73a, 98a, 117a, 118a, 119a). In June, 1958, Zeckendorf was finally able to arrange to borrow sufficient money from third parties to enable it to exercise the option (146a, 147a). Until that time Zeckendorf was not in a position to exercise the option, even if it desired to do so. In September, 1958, Zeckendorf exercised the option thus giving Comtel a profit of $872,000 (40a, 135a-137a). New York law applied to the transaction (102a).

On September 4, 1958, Zeckendorf informed Comtel that it would exercise the option on September 5, 1958. On September 4, 1958, Comtel and its stockholders adopted a plan of complete liquidation authorizing the dissolution of Comtel and the pro rata distribution of its assets to its stockholders on or before December 31, 1958. On September 5, 1958, Comtel sold the Commodore shares to Zeckendorf pursuant to the exercise of the option, discharged its liabilities and distributed its remaining assets (consisting of cash) to its stockholders in complete cancellation and redemption of their stock. In its Federal income tax return for its taxable year 1958, Comtel treated the gain of $872,000 realized upon the sale of the Commodore shares as "gain . . . from the sale or exchange by it of property" which was subject to non-recognition under Section 337(a). The stockholders of Comtel reported a capital gain upon the liquidation of Comtel. (21a, 40a, 41a).

Both Comtel and Zeckendorf intended the transactions between them to be a purchase by Comtel of the Commodore shares in February, 1958, and a sale by Comtel to Zeckendorf of the Commodore shares in September, 1958, as evidenced by the fact that the parties so treated them in all respects on their books and in their tax returns (43a).

Neither party claimed that there was a debtor-creditor relationship between them. Comtel had no indemnity against loss with respect to its investment in the Commodore shares.

The Tax Court held that even though Zeckendorf had no legal obligation to exercise the option or purchase the Commodore shares from Comtel, the transaction was "in substance" a loan of $8,264,000 by Comtel to Zeckendorf and that the $872,000 profit realized by Comtel on the exercise of the option by Zeckendorf was interest on that loan rather than gain from the sale of property. The Tax Court accordingly held that Section 337(a) was not applicable and that Comtel was taxable upon $872,000 of interest income.*

On appeal, petitioners argued that the transactions could not be held to create a debt since Zeckendorf was never legally obligated to repay to Comtel any part of the $8,264,000 which Comtel had used to purchase the Commodore shares in February, 1958. As an alternative legal position, the petitioners also argued, for the first time on appeal, that even if the Tax Court was right that Comtel had loaned Zeckendorf $8,264,000 in February, 1958, against Zeckendorf's "debt" obligation to pay $9,136,000 to Comtel in September, 1958, the $872,000 profit was not

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*The Tax Court did not find, nor could it on the evidence, that Zeckendorf was *certain* to exercise the option. Although Zeckendorf's stockholder (Webb & Knapp, Inc.) had guaranteed Comtel's stockholders (other than Zeckendorf) a profit of $43,500 if the option were not exercised, that was far less than the profit of $872,000 which Comtel realized on the exercise of the option (which Zeckendorf shared as a 33⅓% stockholder of Comtel). If the Commodore shares had not increased in value after February, 1958, it would have cost Zeckendorf at least $360,000 more to exercise the option than not to exercise it. The computations upon which that $360,000 figure is based were contained in petitioners' brief in the Court of Appeals and were not challenged by the Department of Justice. Zeckendorf was thus not economically compelled to exercise the option regardless of fluctuations in the value of the Commodore shares.

interest income but was original issue discount within the meaning of Section 1232(b)(1). The amount of original issue discount would be "gain from the sale or exchange of property" under the express terms of Section 1232(a)(2)(A) upon Zeckendorf's payment of its "debt". The "debt" would be "property" owned by Comtel and the payment of the debt would be the "sale or exchange" of that property. Accordingly, Comtel would be exempt from tax on the amount of the original issue discount since Section 337(a) exempts any "gain . . . from the sale or exchange by it of property" within the twelve-month period beginning on the date of the adoption of its plan of complete liquidation.

The Court of Appeals affirmed the Tax Court's decision that the transaction was in substance a loan by Comtel to Zeckendorf and that the $872,000 profit was interest income, even though Zeckendorf was not obligated to exercise the option. The Court of Appeals refused to consider the petitioners' alternative legal argument that the payment of the "debt" by Zeckendorf resulted in a gain from "the sale or exchange of . . . property" within the meaning of Section 337(a) on the ground that it had not been raised below. In so doing, the Court acted *sua sponte*, since the Department of Justice had not suggested (either on brief or on oral argument) that failure to raise the alternative legal argument in the Tax Court should prevent its consideration by the Court of Appeals.

Reasons for Granting the Writ

I

The Court below has decided an important question of Federal law, namely, that there may be a debt for Federal income tax purposes where the "debtor" is under no un-

conditional legal obligation to pay any money to the "creditor". Under the applicable State law the New York Court of Appeals has held that a sale of property coupled with an option to purchase that property does not create a debt. The decision of the Court below is thus in conflict with decisions of the New York Court of Appeals. It is also in conflict with decisions of this Court, of the Court below and of other Courts of Appeals.

The New York courts have held since 1838 that a sale of property coupled with an option to purchase such property does not create a debt unless the sales price is grossly inadequate (admittedly not true here). The transferee of the property becomes the absolute owner subject only to the option. *Glover* v. *Payn*, 19 Wend. 518 (1838); *Fullerton* v. *McCurdy*, 55 N. Y. 637 (1873); *Randall* v. *Sanders*, 87 N. Y. 578 (1882); *Youssoupoff* v. *Widener*, 246 N. Y. 174, 158 N. E. 64 (1927); see also Rev. Rul. 54-43, 1954-1 C. B. 119.

The decision of the Court below is in conflict with the decision of this Court in *Deputy* v. *du Pont*, 308 U. S. 488, 497-8 (1940), in which this Court stated that the terms "indebtedness" and "interest" for Federal income tax purposes have "the usual, ordinary and everyday meaning". Zeckendorf was not "indebted" to Comtel in any ordinary and everyday sense of that word. The transactions between Zeckendorf and Comtel admittedly did not create a debt for the purpose of (1) permitting Comtel to compel Zeckendorf to pay any part of it, (2) giving Comtel a provable claim if Zeckendorf has gone into bankruptcy before exercising the option, (3) giving Zeckendorf or its trustee an equity of redemption in the Commodore shares if the option had not been exercised, or (4) determining whether the usury laws were applicable. A transaction which is not a loan for any other purpose cannot be treated as in sub-

stance a loan for Federal income tax purposes. Tax law is not thus to be divorced from the general body of the law.*

The decision of the Court below is also in conflict with previous decisions of that Court, *e.g.*, *Commissioner* v. *O.P.P. Holding Corp.*, 76 F. 2d 11, 12 (2d Cir. 1935), and *Jewel Tea Company, Inc.* v. *U. S.*, 90 F. 2d 451, 453 (2d Cir. 1937). In the *Jewel Tea Company* case, *supra*, the Court stated that the *O.P.P. Holding Corporation* case, *supra*, held that a debt cannot exist unless "the holder may unconditionally demand his money at a fixed time". The Court stated (90 F. 2d at 453): "All we now decide is that in the absence of such a provision the security cannot be a debt."

The decision of the Court below is in conflict with the decisions of other Courts of Appeals which have decided that there cannot be a debt for Federal income tax purposes in the absence of an unconditional enforceable legal obligation to pay: *Commissioner* v. *H. P. Hood and Sons, Inc.*, 141 F. 2d 467, 469, 470 (1st Cir. 1944); *Autenreith* v. *Commissioner*, 115 F. 2d 856, 858 (3rd Cir. 1940); *Bercaw* v. *Commissioner*, 165 F. 2d 521, 525 (4th Cir. 1948); *Campbell* v. *Carter Foundation Production Co.*, 322 F. 2d 827, 831 (5th Cir. 1963); *Guardian Investment Corp.* v.

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*In deciding that the transactions between Comtel and Zeckendorf created a debt owing from Zeckendorf to Comtel, the Court below used an argument not made either by the Tax Court or by the Commissioner of Internal Revenue, namely, that the transactions were analogous to a nonrecourse loan (p. 16b of the Appendix to this petition). In the case of a nonrecourse loan, however, there is in terms an obligation of the debtor to pay the creditor from a particular fund or source. In the instant case, there was no such obligation. Moreover, if, on a purported purchase of property, the "purchaser" merely gives his nonrecourse note secured by the pledge of the property, it has been held that the transaction is the equivalent of an option to purchase the property rather than a purchase of the property. *Becker* v. *Commissioner*, 277 F. 2d 146, 149 (2d Cir. 1960); *Lynch* v. *Commissioner*, 273 F. 2d 867, 870 (2d Cir. 1959). The holder of an option and the maker of a nonrecourse note are both free to change their minds about the "purchase".

Phinney, 253 F. 2d 326, 330, 331 (5th Cir. 1958); *Sherwood Memorial Garden* v. *Commissioner*, 350 F. 2d 225, 228 (7th Cir. 1965); *Gilman* v. *Commissioner*, 53 F. 2d 47, 50 (8th Cir. 1931); *Washmont Corporation* v. *Hendricksen*, 137 F. 2d 306, 309 (9th Cir. 1943); *Thompson* v. *Commissioner*, 235 F. 2d 599, 601 (9th Cir. 1956); *Bowersock Mills & Power Co.* v. *Commissioner*, 172 F. 2d 904, 907 (10th Cir. 1949).

The Tax Court's decision that the transactions between Comtel and Zeckendorf were in substance a loan and created a debt was based upon its finding that Zeckendorf never wavered in its desire to acquire the Commodore shares and ultimately did exercise the option (25a). It conceded that there was no legal obligation binding Zeckendorf to exercise the option and it did not find as a fact (nor could it have done so on the record) that Zeckendorf was certain to exercise the option at the time it was given. Concededly, the Commodore shares could, in the period from February, 1958, to September, 1958, have declined sufficiently in value so that it would have been unprofitable for Zeckendorf to exercise the option. Also Zeckendorf might never have obtained the financing which enabled it to exercise the option. Yet the Tax Court did not state what the substance of the transaction would have been if the option had *not* been exercised, a possibility that might have occurred. *Cf. Green* v. *Commissioner*, 367 F. 2d 823 (7th Cir. 1966), where the Tax Court had found on the basis of testimony and correspondence between the parties that what was in form an option was actually a *firm obligation to purchase*. Such a finding is lacking in the instant case.

II

In refusing to consider the petitioners' alternative legal argument, raised for the first time on appeal, the Court below decided an important question of Federal law and

procedure contrary to the rules laid down by this Court, by previous decisions of the Court below and by a number of other Courts of Appeals.

The issue decided by the Tax Court was whether the profit of $872,000 realized by Comtel in its transactions with Zeckendorf was "gain . . . from the sale or exchange . . . of property" which was exempt from tax under Section 337(a). The Tax Court held that the transaction was in substance a loan by Comtel of $8,264,000 to Zeckendorf against Zeckendorf's debt to Comtel in the amount of $9,136,000. It then held that the profit of $872,000 which Comtel realized on the collection of that debt was interest income rather than gain from the sale or exchange of property and hence was not subject to the non-recognition provisions of Section 337(a). In other words, the Tax Court held that Comtel had never been the owner of the Commodore shares and that the only property which Comtel owned was a debt owing to it by Zeckendorf. If, as held by the Tax Court, Comtel had acquired for $8.264,000 the obligation of Zeckendorf to pay it $9,136,000, the difference between the sums would concededly be original issue discount as defined in Section 1232(b)(1). Section 1232(a)-(2)(A) expressly provides that original issue discount when realized by the taxpayer upon the payment of a debt must "be considered as gain from the sale or exchange of property which is not a capital asset". Section 337(a) in turn requires the non-recognition of "gain . . . from the sale or exchange . . . of property". Accordingly, the petitioners' alternative argument which was raised for the first time on appeal was merely an additional legal argument in support of the issue which was before the Tax Court, namely, whether the $872,000 profit realized by Comtel was a gain from the sale or exchange of property under Section 337(a). It was based upon the record already made below and did not require any additional findings of fact.

Section 1232 is contained in Part IV of Subchapter P (Sections 1231-1250) which is entitled "Special Rules for Determining Capital Gains and Losses". While there is as yet no court decision* or ruling that what is treated as a "gain from the sale or exchange of property which is not a capital asset" under Section 1232(a)(2)(A) should be treated as a gain from the sale or exchange of property under Section 337(a), analogous cases and rulings indicate that what Congress has treated as gains from the sale or exchange of property in Part IV of Subchapter P are also to be treated as gains from the sale or exchange of property for the purposes of Section 337(a). For example, under Section 1231, income from an involuntary conversion of property is treated as gain from the sale or exchange of property and hence is entitled to be treated as gain from the sale or exchange of property under Section 337(a). *Towanda Textiles, Inc.* v. *United States*, 180 F. Supp. 373 (Ct. Cl. 1960); *Kent Manufacturing Corporation* v. *Commissioner*, 288 F. 2d 812 (4th Cir. 1961); Rev. Rul. 64-100, 1964-1 C. B. (Part 1) 130, revoking Rev. Rul. 56-372, 1956-2 C. B. 187. The Internal Revenue Service has also ruled that gain from the sale of an emergency facility which, under Section 1238, is considered as gain from the sale or exchange of property which is not a capital asset is to be treated as gain from the sale or exchange of property under Section 337(a). Rev. Rul. 59-308, 1959-2 C. B. 110.

Because Section 871 of the Code does not tax non-resident aliens on gains from the sale or exchange of property, Section 1232(a)(2)(A) prevented non-resident aliens from being taxed on original issue discount since such dis-

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*This Court in *United States* v. *Midland Ross Corporation*, 381 U. S. 54, 58-9 (1965), considered the taxability of original issue discount under the Internal Revenue Code of 1939 but refused to speculate on the meaning of Section 1232(a)(2)(A) which was not before it (p. 59n).

count was considered as a gain from the sale or exchange of property. Non-resident aliens are, however, taxed on "interest". In order to tax non-resident aliens on original issue discount, Congress amended Section 871 in 1966 specifically to provide in Section 871(a)(1)(C) that the taxable income of non-resident aliens includes

> "(C) in the case of bonds or other evidences of indebtedness issued after September 28, 1965, amounts which under section 1232 are considered as gains from the sale or exchange of property which is not a capital asset".

See House Report No. 1450 (89th Cong., 2d Sess.), page 19; Senate Report No. 1707 (89th Cong., 2d Sess.), page 24.

The Department of Justice in its brief in the Court below argued that what is considered as a "gain from the sale or exchange of property which is not a capital asset" under Section 1232 could not be considered "gain . . . from the sale or exchange . . . of property" under Section 337(a). The Department also contended on oral argument that Section 337(a) did not apply to exempt from tax gain from the sale or exchange of property which is not a capital asset. Those arguments are completely refuted by the cases and the rulings of the Internal Revenue Service above cited. Accordingly, the additional legal argument urged by the petitioners before the Court of Appeals was a substantial one and was not frivolous.

The refusal of the Court below to consider an additional legal argument addressed to the issue which was before the Tax Court is in conflict with the rule laid down by this Court in *Hormel* v. *Helvering*, 312 U. S. 552, 557, 558 (1941). There this Court stated:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.

> A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (p. 557)

In stating "the philosophy which underlies this Court's decisions with relation to appellate practices," this Court referred to cases presenting a situation similar to that presented by the instant case as "those which have been remanded because the lower courts failed to give consideration to a phase of the case involving legal theories not presented" (p. 558). See also *Helvering* v. *Leonard*, 310 U. S. 80, 83 (1940).

The Court below, prior to the instant case, followed the rule laid down by this Court in the *Hormel* case, *supra*, and, where the interpretation of a particular section of the Internal Revenue Code was at issue before the trial court, has permitted a legal argument as to the interpretation of that section to be made for the first time on appeal, even though not made in or considered by the trial court, where no additional findings of fact were required. In *Chase National Bank* v. *United States*, 116 F. 2d 625, 627, 628 (2d Cir. 1940), the interpretation of Section 302(g) of the Revenue Act of 1926 was involved. The appellant relied upon an additional legal argument as to the interpretation of that section which was not made below. The Court considered that argument over the opposition of the appellee and reversed the trial court saying:

> "Nevertheless at all times it relied on the provisions of Section 302(g) as the basis for taxation and is now simply giving new reasons to show that Section

> 302(g) is applicable. It is quite impossible to suppose that a new reason for the application of a statute always relied on may not be considered by this court because of the ruling in Helvering v. Wood, 309 U. S. 344, 60 S. Ct. 551, 84 L. Ed. 796. Indeed, in Helvering v. Leonard, 310 U. S. 80, 60 S. Ct. 780, 84 L. Ed. 1087, the Supreme Court did the very thing the government is asking us to do here. It decided that Section 22(a) of the Revenue Act rendered certain income of a trust taxable against the settlor and reached this conclusion upon an argument first made before it which had not been presented to the court below." (pp. 627-628)

Similarly, in *Commissioner* v. *Hopkinson,* 126 F. 2d 406, 409 (2d Cir. 1942), the appellant for the first time on appeal relied upon a new legal argument. The Court upheld the appellant's right to do so, stating:

> "He did not rely upon this contention before the Board but wishes to do so now. We think that is permissible under Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037, as the respondent has been put to no disadvantage by way of surprise; has filed, by leave, a supplemental brief covering that issue; and no facts not already of record are required for decision." (p. 409)

In *Bates Valve Bag Corporation* v. *Higgins,* 157 F. 2d 886, 887 (2d Cir. 1946), the Court below also permitted an additional legal argument to be made by the appellant for the first time on appeal, saying:

> "The appellee's objection to the argument that the corporation was not bound by any contract pro-

> vision not to declare dividends payable in its obligations because made here for the first time is unsound. The issue below was, as it is here, whether the taxpayer was by contract disenabled to pay dividends to such an extent and in such a way that it was entitled to the credits now claimed. The argument presents a new thought, but not a new issue and could be used on appeal to give added support to the position taken by the appellant below." (p. 887)

Since the instant case was decided, a different panel of the Court below has considered, as a matter of course, a new legal argument not raised in the Tax Court. *Gordon* v. *Commissioner*, 67-2 USTC ¶ 9592 (2d Cir., July 26, 1967), not yet officially reported. That case involved the application of Section 355 to the distribution by a corporation to its shareholders of stock of a subsidiary. The Commissioner was permitted to raise for the first time on appeal the additional legal argument that the distribution of the subsidiary's stock had been made in two parts rather than as a single distribution.

The decision of the Court below is also in conflict with decisions of the Courts of Appeals for the Fifth, Eighth and Ninth Circuits in *Chase Manhattan Bank* v. *Commissioner*, 259 F. 2d 231, 237-238 (5th Cir. 1958); *Jack Ammann Photogrammetric Engineers, Inc.* v. *Commissioner*, 341 F. 2d 466, 467 (5th Cir. 1965); *United States* v *Dakota Tractor & Equipment Co.*, 125 F. 2d 20, 25 (8th Cir. 1942), *cert. denied* 316 U. S. 671; *Ah Pah Redwood Co.* v. *Commissioner*, 251 F. 2d 163, 168-9 (9th Cir. 1957); *MacRae* v. *Commissioner*, 294 F. 2d 56, 59 (9th Cir. 1961), *cert. denied* 368 U. S. 955 (1962); and *United States* v. *Merrill*, 211 F. 2d 297, 303 (9th Cir. 1954).

In *Jack Ammann Photogrammetric Engineers, Inc.* v. *Commissioner, supra,* the Court of Appeals for the Fifth Circuit stated:

> "Here, petitioner makes a several-pronged attack on the Tax Court decision. Since these are legal theories that can be fairly disposed of on the record before us, we do not consider that we should refuse to consider them merely because they were not urged in the Tax Court. Chase Manhattan Bank v. Commissioner of Internal Revenue, 5 Cir., 259 F. 2d 231." (p.467)

In *United States* v. *Dakota Tractor & Equipment Co., supra,* the Court of Appeals for the Eighth Circuit permitted an appellant to raise a new legal argument on appeal even though it was not raised in the trial court and the appellee objected to its consideration. The Court said:

> "Appellee challenges the right of appellant to present this issue because it was not raised in the trial court. Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (Helvering v. Hormel, 8 Cir., 111 F. 2d 1, this Court) rules otherwise. We consider the merits of this contention." (p. 25)

So also in *MacRae* v. *Commissioner, supra,* the Court of Appeals for the Ninth Circuit stated:

> "The Commissioner contends that we should not consider on this appeal such alternate grounds because they were not raised in the pleadings before the Tax Court. . . . The claimed deduction for out-of-pocket losses arises out of the same transactions which were considered by the Tax Court. No new fact issues are presented, and it is not necessary to

> go beyond the findings of the Tax Court to consider the propriety of the claimed deduction. The Commissioner is not prejudiced, nor has he been denied the opportunity to present arguments against allowance thereof. Under these circumstances, we believe that justice requires that we pass upon the merits of taxpayer's contentions." (p. 59)

The question of Federal law and procedure involved in the instant case, namely, whether a case may be decided by an appellate court without consideration of legal arguments of the appellant which were not raised below (and which, if sound, would require reversal) goes far beyond the tax field in which the instant case arises. Two relevant quotations from non-tax cases which indicate the reasons why we believe this Court should remand this case to the Court below for consideration of petitioner's additional legal argument are as follows:

> ". . . where, as here, the case below was tried, not upon any misapprehension of the facts, but upon a misapprehension of the effect of those facts in law, appellant may not be prevented from pressing here for the application, to the proven facts, of the correct principles of law." *Associated Indemnity Corporation* v. *Scott,* 103 F. 2d 203, 209 (5th Cir. 1939).

> "We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties." *Smith Engineering Co.* v. *Rice,* 102 F. 2d 492, 499 (9th Cir. 1938).

In refusing *sua sponte* to consider an additional legal argument not made below, the Court of Appeals has so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision. The refusal of the Court below to consider a substantial legal argument of the petitioners has deprived them of justice. If that argument should prevail, no tax would be payable. This Court should remand this case to the Court below with instructions to consider petitioners' additional legal argument.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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